APPEAL NO. 040733
FILED MAY 26, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 9, 2004, with the record closing on March 3, 2004. The hearing officer resolved the disputed issue by deciding that the issue of the appellant's (claimant herein) impairment rating (IR) was not ripe for adjudication and that a second designated doctor should be appointed. In his appeal, the claimant asserts error in the hearing officer's appointment of a second designated doctor and complains that the hearing officer erred in excluding the report of the required medical examination (RME) doctor selected by the Texas Workers' Compensation Commission (Commission). There is no response from the respondent (carrier herein) to the claimant's request for review in the appeal file.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that this injury took place when he fell off a ladder head first. At an earlier CCH the parties entered into an agreement concerning the extent of injury, which agreement was contained in a Decision and Order dated March 12, 2003. According to the Decision and Order, which is in evidence in the present case, the parties agreed that the claimant's compensable injury extends to include a right rotator cuff tear, an aggravation of thoracic compression fractures at T5, T9, and T10, and a lumbar sprain, but does not include epileptic seizures. The parties stipulated that the Decision and Order of March 12, 2003, was not appealed. At the CCH in the present case, the claimant contended that he also suffered a cervical spine injury and the carrier agreed on the record that the injury did include an injury to the cervical spine.

There are several certifications of IR in evidence. Dr. Hi certified on a Report of Medical Evaluation (TWCC-69) dated June 14, 2002, that the claimant's IR is 46%. This IR included impairment for seizure disorder. Dr. Hi was requested to rate the claimant's IR without seizure disorder and complying with that request certified on a TWCC-69 dated May 22, 2003, that the claimant's IR is 24%. Dr. He, the designated doctor selected by the Commission certified on a TWCC-69, with attached report dated July 8, 2003, that the claimant's IR is 69%. In response to a letter of clarification, Dr. He stated that without including impairment for seizure disorder that he would assess the claimant's IR as 39%.

At the CCH, the claimant took the position that the hearing officer should give presumptive weight to Dr. He's 69% IR certification. The carrier argued that the hearing officer should find a 24% IR based upon Dr. Hi's amended certification. After the CCH

the hearing officer wrote Dr. He a letter requesting clarification. Dr. He responded to this letter. The hearing officer, apparently singularly unsatisfied with the designated doctor's response, made a finding in her decision that Dr. He "refused and failed to perform his obligation and duties as designated doctor." The claimant argues on appeal that there is no evidence to support this finding. We must agree.

In Texas Workers' Compensation Commission Appeal No. 94966, decided September 6, 1994, the Appeals Panel stated "a second designated doctor is rarely appropriate and should be restricted to situations where, for example, the first selected designated doctor cannot or refuses to properly apply the AMA Guides [appropriate edition of the Guides to the Evaluation of Permanent Impairment, published by the American Medical Association] (Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993), particularly after being asked for clarification or additional information concerning the report." In the present case, the designated doctor has responded to all requests for clarification. We find nothing in the correspondence between the hearing officer and the designated officer that establishes that Dr. He did not follow the protocols of the AMA Guides in assessing the IR. The hearing officer is therefore in error in finding the issue of IR is not ripe for adjudication and in ordering the appointment of a second designated doctor.

Sections 408.122(c) and 408.125(e) of the 1989 Act provide that a report of a Commission-appointed designated doctor shall have presumptive weight on the issues of maximum medical improvement and IR and the Commission shall base its determination on such report unless the great weight of other medical evidence is to the contrary. The Appeals Panel has stated that the great weight of the other medical evidence requires more than a mere balancing or preponderance of the evidence; that no other doctor's report, including a treating doctor's report, is accorded the special presumptive status; that the designated doctor's report should not be rejected absent a substantial basis for doing so; and that medical evidence, not lay testimony, is required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 960817, decided June 6, 1996; Texas Workers' Compensation Commission Appeal No. 94835, decided August 12, 1994.

That being said the question remains as what is the claimant's correct IR. We cannot render an IR of 69% as requested by the claimant. The claimant did agree that his injury did not include epileptic seizures. We appreciate that the claimant is arguing that Dr. He rated post-traumatic, and not epileptic seizures. We, however, have the same problem with this argument as the hearing officer did. The claimant is not contending that he is having two types of seizures, but is only claiming that he began having seizures after his compensable injury. The claimant testified that he has never been diagnosed with epilepsy. Under these facts, it is difficult to interpret his agreement that his injury did not include epileptic seizures to mean something other than he was agreeing that the seizure disorder later rated by Dr. He was not part of his compensable injury. In light of that agreement, whatever the merits of whether the claimant's injury caused the seizures, we cannot give presumptive weight to an IR that includes a rating for impairment due to these seizures.

However, we can and will give presumptive weight to the designated doctor's IR, which does not include impairment for the claimant's seizures. We, therefore, reverse the decision of the hearing officer and render a new decision that the claimant's IR is 39%. We note that the carrier argued to the hearing officer that she could only adopt an IR found on a TWCC-69. It is not necessary for a designated doctor who has issued a TWCC-69 already and is responding to a Commission request for clarification to issue a new TWCC-69 to certify IR. In this situation, a designated doctor may certify IR in his letter responding to the letter of clarification, just as Dr. He did here.

We must also address the claimant's evidentiary point. The claimant sought to introduce the report of the RME doctor selected by the Commission to determine the extent of the claimant's injury. The carrier objected to this report on the ground that the carrier's attorney had never seen it before. The claimant's attorney admitted that the report had not been exchanged within 15 days after the benefit review conference, but argued that he had an agreement with the carrier's attorney that it was not necessary to exchange documents that they both had and that the report reflected upon its face that it had been sent to the carrier. The hearing officer excluded the report as not being timely exchanged without good cause. While we find it incomprehensible that the carrier's attorney would not have seen this report, and troubling that the report of the Commission's own expert is excluded from evidence, any error in the exclusion of this report is rendered moot, and thus harmless, by the claimant's agreement concerning the extent of his injury, as the claimant sought to admit it to establish that the claimant's seizures resulted from his compensable injury.

For the reasons stated above, we reverse the hearing officer's decision and order on the IR issue and render a new decision as stated.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Margaret L. Turner
Appeals Judge